# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. __

TOM DON FRANANO,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.**

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petioner Tom Don Franano respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in the case of *Tom Don Franano, Appellant,* v. *United States of America, Appellee,* No. 16,071, entered on April 27, 1960.

## OPINIONS BELOW.

No opinion was filed by the Trial Court. The opinion of the Court of Appeals is reported in 277 F.2d 511, and is set out at pages 2A to 12A, inclusive of the Appendix attached hereto.

## JURISDICTION.

The jurisdiction of this Court to entertain instant petition for certiorari is based upon Section 1254 (1), Title 28, United States Code.

The judgment of the Court of Appeals sought to be reviewed was entered on April 27, 1960 (a true copy of such Judgment of the Court of Appeals is set out at page 24A, hereinafter); petitioner's timely Petition for Rehearing was overruled by the Court of Appeals on June 3, 1960, and by Order dated June 30, 1960, Associate Justice Charles E. Whittaker, Supreme Court of the United States, extended the time for the filing of this petition until August 2, 1960. On July 8, 1960, the Court of Appeals entered an order extending the stay of mandate herein until August 13, 1960, with the provision that if on or before said date this petition is filed, upon receipt of a certificate from the Clerk of this Court relative thereto, the stay granted shall continue until the final disposition of this case by this Court.

## QUESTIONS PRESENTED.

1. In a National Motor Vehicle Theft Act case involving one conspiracy and six substantive counts, where all of the substantive counts were included as overt acts

in the conspiracy count, should petitioner's conviction be allowed to stand where a Special Agent of the Federal Bureau of Investigation in attendance at the trial was allowed, over objection, to introduce six so-called summary exhibits going to each count of the indictment reflecting selective items from conflicting evidence introduced at the trial, information not in evidence at the trial, conclusions, hearsay information taken from FBI reports not in evidence and argumentative data invading the province of the jury?

2. In considering petitioner's contention that there was a fatal variance between allegations of the indictment in Counts II, IV and VII and the proof introduced relative to these counts, since the numbers on the automobiles involved were different, and petitioner's further contention the trial court erred in denying his motion for acquittal on Counts II, V, VI and VII for insufficiency of the evidence, did the Court of Appeals err in applying the theory that the jury, in finding appellant guilty on Count I, the conspiracy count, presumptively, viewing the evidence in a light most favorable to the Government, found him guilty of all the overt acts charged and that these overt acts pertained to the transportation of the cars described in Counts II, III, IV, V, VI and VII.

3. Should this Court as a matter of great public interest and importance in the administration of our criminal laws consider and rule on the growing practice in Federal Courts, as illustrated in this case, of charging defendants in the same indictment or information with violation of conspiracy and substantive statutes regarding the same alleged crimes for the obvious purpose of getting into evidence data not otherwise admissible and thereby creating the confusion and problems resulting therefrom?

## STATUTES INVOLVED.

The statutes involved are set out verbatim on page 1A of the appendix hereto, and are as follows:

Section 371, Title 18, United States Code.
Section 2312, Title 18, United States Code.

## STATEMENT.

Petitioner and three other persons, Frank Triola, Jr., Sam Triola and Jo Ann King, were charged with conspiring to violate the so-called Dyer Act, Section 2312, Title 18, United States Code, and with violating this same act in an indictment containing seven counts. The first count, the conspiracy count, set forth fourteen overt acts and, according to the opinion of the Court of Appeals, page 5, "These overt acts pertained to the transportation of the cars described in Counts II, III, IV, V, VI and VII." Counts II through VII were substantive counts. It is here noted that the motor vehicles described in the various counts of the indictment, including the overt acts, were all Chevrolets. A copy of the indictment appears in the Appendix attached hereto beginning at page 13A.

At the trial, the Goverment called forty-nine witnesses and introduced seventy-two exhibits. Much evidence was introduced by the Government, under the theory it would be connected with the conspiracy, which had nothing whatsoever to do with any of the cars described in the indictment and was not, in fact, connected up. For example, Exhibits 44, 45 and 46, all pertain to vehicles in no way related to these charges (T. 227, 228, 229). One of these was relative to a 1957 Cadillac automobile.

At the close of the Government's case, the trial court sustained the motion of Sam Triola for judgment of acquittal (Tr. 408). Jo Ann King was found guilty on the conspiracy charge only and put on probation. Petitioner and Frank Triola, Jr., were found guilty on all seven counts and were each sentenced to custody of the Attorney General for a term of four years concurrently on each of Counts I, II and III and to a term of four years on each of Counts IV, V, VI and VII, these latter sentences to be served concurrently with each other, but consecutively to the terms on Counts I, II and III, making a total sentence of eight years (R. 104).

Petitioner then appealed to the Court of Appeals *in forma pauperis* and a fine young member of the bar, by court appointment, submitted typewritten briefs in his behalf seeking reversal on seven main grounds, including the following which are being urged in this petition: (a) The trial court erred in admitting exhibits 63 through 68; (b) petitioner's motion for judgment of acquittal on Counts II, IV and VII, should have been sustained on the grounds that there were fatal variances between the allegations of the indictment and the proof and (c) the trial court erred in overruling petitioner's motion for judgment of acquittal as to Counts II, V, VI and VII, on the grounds of insufficiency of the evidence.

Witness Frederick H. Alvey, Special Agent of the Federal Bureau of Investigation, identified exhibits 63 through 68 as charts which he prepared showing where the automobiles in issue were taken from and recovered and their serial numbers (T. 380). Copies of these exhibits are set out beginning on page 18A of the Appendix attached hereto. Agent Alvey testified that exhibit 63 related to Count II (T. 381) and that exhibits 64, 65, 66, 67 and 68, related to the automobiles allegedly in issue in the remaining

counts of the indictment. It will thus be noted that these exhibits went directly to each and every count of the indictment, including the conspiracy count, since each substantive count of the indictment was included as an overt act in the conspiracy count. Each of the exhibits were admitted over objections of counsel for petitioner on the grounds the exhibits did not constitute the best evidence, were hearsay and were argumentative in their cumulative effect (T. 382). The basis for said objections was in part the following testimony of Special Agent Alvey (T: 382):

> "Question: I note it says, 'Model, confidential serial number, the other number, car taken from, and car recovered, and title history.' Now, you compiled that as a result of the information you had learned from other witnesses, correct?
>
> Answer: That and my report. I checked it with my report as they went along and prepared it.
>
> Question: Your report as an agent?
>
> Answer: Yes, sir.
>
> Question: Which you file on all cases which you prepare and turn in on all cases which you investigate and file a report, an F.B.I. report?
>
> Answer: That's right.
>
> Question: So it is based upon the information you have received about the car mentioned in court, number two?
>
> Answer: That is correct."

Petitioner pointed out to the Court of Appeals that Agent Alvey had, in fact, selected and interpreted the data appearing on the said six charts and had resolved conflicting evidence introduced at the trial so it would conform to the trial theory advanced by the government. For example, on Exhibit 68, Mr. Alvey's conclusion as to the "Confidential" serial number on the automobile in issue, that is 57S309074, is a selective conclusion on his part since

there was conflict in the evidence as to the serial number on the vehicle involved in Count VII (T. 50, 83). Witness Pearson (R. 50) testified the number on this vehicle was 57S509074.

Further testimony of Witness Wilson J. Brady, Van Chevrolet Company (R. 218), was that the last check had of the automobile involved in Count III of the indictment was on July 29, 1957, but exhibit 64, prepared by Mr. Alvey, reflects the car was taken from Van Chevrolet Company "between August 6 and 14, 1957."

Witness F. S. Weller, Dumas-Milner Chevrolet Company, testified (T. 282) the automobile involved in Count IV, was reported missing on September 9, 1957, and that he would say it was on the lot a couple of days prior to that time. Exhibit 65 prepared by Mr. Alvey, however, states this car was taken from Dumas Milner Chevrolet Company between August 8 and 13, 1957. It is further noted Exhibit 65 reflects the car involved in Count IV was recovered on January 29, 1958, although this date does not appear in the testimony of either Mrs. Eunice K. Cormier or Special Agent Claude E. Gamble or any other witness at the trial.

Regarding the car allegedly involved in Count V, witness Wilson J. Brady, Van Chevrolet Company, testified it was visually checked as a floor plan car on September 14, 1957 (T. 220). Exhibit 66, however, relative to this automobile states it was taken from Van Chevrolet Company "between September 12, 1957, and October 15, 1957." There was simply no testimony or evidence offered at the trial supporting this conclusion.

Mr. Alvey further testified (T. 389) regarding his six charts:

"Question: It is true then, is it not, to say that all of the information contained in these Exhibits is based solely on information you have received from sources other than your own personal knowledge?

Answer: Yes, sir, I would say that is correct."

Exhibit 67, relative to the car allegedly stolen according to Count VI, reflects same was taken from St. Paul, Minnesota, "Between October 1, 1957, and October 31, 1957." It is noted there was simply no evidence introduced at the trial to support these data and that witness Newman Grossman, Minneapolis, Minnesota, owner of the company from which the car was taken testified (R. 307), it was shipped to his company on August 11, but no other date appears in the record to show when the car was allegedly taken or to substantiate the data reflected on the chart prepared by Agent Alvey. Exhibit 67 further reflects the car pertinent to Count VI, was recovered at Kansas City, Missouri, on November 26, 1957. Witness William Oscar McGrew, Kansas City, Missouri, who later purchased this automobile, testified (R. 300) it was bought by him on November 2, 1957, and that he had it for about two weeks before it was examined and kept by the Kansas City Police Department (R. 301). There is simply nothing in the trial record to substantiate the date November 26, 1957, used by Mr. Alvey.

In spite of the fact numerous discrepancies between the charts prepared by Agent Alvey and the evidence introduced at the trial, as outlined above, were presented to the Court of Appeals, and since Agent Alvey on re-direct examination and in response to a leading question testified that everything on the exhibits "was testified to here in Court during the three days of this trial" (R. 390), the Court of Appeals disposed of petitioner's contentions with the following statement on page 9 of its opinion:

"* * * The witness testified that there was nothing in the exhibits which had not already been introduced into evidence and we think the ruling was not prejudicial."

Regarding Counts II, IV and VII, petitioner pointed out to the Court of Appeals that testimony introduced at the trial (R. 95) showed that every 1957 Chevrolet produced had a different identifying serial number (R. 97); that this number was stamped on the motor block and also on a plate attached to the left-front door post (R. 97). Although there was much testimony to the effect number plates on the front doors of the automobiles involved were apparently changed, there was no testimony at the trial that anything was wrong with the numbers stamped on the motor blocks of any of the automobiles or that any effort to change these in any way was apparent.

Count II of the indictment in this case alleges theft of a 1957 Chevrolet automobile bearing serial number 57K-165361 but the proof introduced at the trial under this Count was regarding the theft of a vehicle bearing number VC57K165366 (R. 145). In Count IV the indictment alleges the transportation of a vehicle bearing number 57K165768, but the proof showed recovery, after the alleged transportation, of an automobile bearing number 57K165786 (R. 333). Count VII of the indictment alleges interstate transportion of a stolen automobile bearing true serial number 57S309074 and fictitious number VC57S301713. The proof at the trial showed recovery of a vehicle bearing true number 57S509074 (R. 50), and fictitious number VC-57S-320173 (R. 84). Absolutely no effort was made to identify any of these automobiles other than by general description and serial numbers, as by unusual equipment, marks or similar items.

In answer to petitioner's contention the above specific variances between the indictment counts and the proof was fatally prejudicial, the Court of Appeals merely stated on page 5 of its opinion:

> "* * * In the instant case there was positive proof of identity regardless of and without reference to the serial marks."

The opinion of the Court of Appeals did not state or indicate the nature of this "positive proof" and we cannot find it in the record of the trial.

With reference to petitioner's contentions there was no evidence to connect him with the offenses alleged in Counts II, V, VI and VII of the indictment, and that his motion for acquittal should have been sustained as to those Counts, as petitioner pointed out to the Court of Appeals, there is absolutely *no* evidence in the record connecting petitioner with the crime alleged in Count II. This point was not even contested by Government attorneys in the Court of Appeals. The only evidence connecting petitioner with Count V at the trial was that Mrs. Grantham notarized a title application at his request (R. 350) and that he was with Frank Triola, Jr., in Colorado at the time this automobile was sold by V. and G. Motors (R. 173, 174). The only evidence connecting petitioner with Count VI was the fact he was present when witness Riccardi was contacted by Triola regarding the selling of the car involved (Tr. 285). There was no evidence petitioner had anything to do with transporting this car interstate. Regarding Count VII, there was evidence petitioner talked to an automobile salesman in Colliersville, Tennessee, on an unknown date before the Christmas Holidays in 1957 (R. 24). The indictment charges the car in Count VII was taken on or about November 22, 1957. Although there was no contention petitioner had anything to do with the

sale of the car in this latter Count, a witness did contend he saw petitioner on the lot where this sale occurred earlier on the same day (R. 72).

The Court of Appeals in its opinion (pages 4 and 5), did not state there was evidence connecting petitioner with Counts II, V, VI and VII, but considered these allegations along with petitioner's contentions above indicated regarding variance between the allegations of the indictment and the proof relative to Counts II, IV and VII, as follows:

> "We shall consider appellant's contention that there is a fatal variance between the allegations of the indictment in Counts II, IV and VII and the proof, and his contention that the court erred in denying his motion for acquittal on Counts II, V, VI and VII, together.
>
> "In considering the question of the sufficiency of the evidence to sustain the judgment, we must view the evidence in a light most favorable to the Government and we must assume as proved every fact the evidence, direct or circumstantial, tends to prove, and the Government as the prevailing party is entitled to the benefit of all such favorable inferences as may reasonably be drawn from the facts proved.
>
> • • •
>
> "In this connection it should be borne in mind that the jury, in finding appellant guilty on Count I, presumptively, viewing the evidence in a light most favorable to the Government, found him guilty of all the overt acts charged. These overt acts pertained to the transportation of the cars described in Counts II, III, IV, V, VI and VII. Thus, overt act No. 1 charges that:
>
> "'On or about July 9, 1957, Tom Don Franano and Frank Triola, Jr., transported a stolen 1957 Chev-

rolet from Kansas City, Missouri to Denver, Colorado.'

"This is the transportation described in Count II of the indictment. Overt act No. 2 likewise describes the transportation charged in Count III of the indictment; Overt act No. 4 charges the transportation charged in Count IV of the indictment; Overt act No. 7 charges the transportation charged in Count V of the indictment; Overt act No. 9 charged the transportation charged in Count VI of the indictment; Overt act No. 14 charged the transportation charged in Count VII of the indictment. Other overt acts charge various circumstances connected with the transportation of the automobiles described in the various Counts in the indictment, such as:

"'Overt Act No. 3. That on or about August 13, 1957, Tom Don Franano and Frank Triola, Jr., went to Pierre, South Dakota, where they obtained fraudulent titles for two stolen motor vehicles.

* * *

"'Overt Act No. 5. On or about August 30, 1957, Jo Ann King went to Russellville, Alabama and obtained two fictitious registrations for automobiles.

"'Overt Act 6. On or about September 12, 1957, Tom Don Franano and Frank Triola, Jr., went to Jefferson City, Missouri and obtained a fraudulent title for a stolen automobile.'

"There was proof that the car described in each Count of the indictment was stolen from the owner and that it was sold by appellant or one of his co-conspirators in another state and there was proof that the appellant, or one of his co-conspirators, fraudulently procured from various states evidence of title for each of the cars described in the indictment.

"Appellant was sentenced to four years on each Count of the indictment. The aggregate sentence was

eight years. The sentence on the conspiracy count is not challenged and we have held that there was no fatal variance between the proof and the allegations of the indictment in the fourth Count, and these Counts run consecutively. We therefore pretermit consideration of the other contentions of the insufficiency of the evidence."

## REASONS FOR GRANTING THE WRIT.

**1. Petitioner's Convictions Should Not Be Allowed to Stand Since They Are Based on Summary Charts or Exhibits Prepared and Introduced by a Special Agent of the Federal Bureau of Investigation (Not an Expert) Summarizing Selective Items from Conflicting Evidence, Information Not in Evidence at the Trial, Conclusions and Hearsay Data Taken from FBI Reports Not in Evidence at the Trial and Invading the Province of the Jury.**

The opinion of the Court of Appeals in this case is in conflict with all previous decisions of the other Circuits which we have been able to find in that no court has previously allowed a non-expert witness or an expert witness on a subject not a part of his qualifications, to introduce charts with the following data and in following manner. Exhibits 63 through 68 were prepared and introduced by a Special Agent of the Federal Bureau of Investigation on the basis of purely hearsay information and, as outlined above in the Statement in specific detail, reflected selective items from conflicting evidence introduced at the trial, information not appearing in the record and not obtainable from the record of the trial and the evidence introduced therein, conclusions, and data put together for the purpose of resolving all questions of the trial which invaded the province of the jury. Such summaries, from an FBI Agent, were undoubtedly given much weight by the jury.

No effort was made to qualify the Agent as an expert and merely summarizing ordinary evidence introduced at a trial in the most favorable light possible for the government is not a proper subject for qualification of an expert.

In a case where expert testimony was used the Court of Appeals for the Third Circuit reversed convictions in *United States v. Ward et al.*, 169 F.2d 460, l.c. 462, and held as follows:

> "We subscribe to the defendants' contention and are of the opinion that they are entitled to a new trial.
>
> "Johnson did more than merely disregard the payroll records. He went further. In comparing the invoices and attached lists with the testimony adduced in court, he made use of other materials not in evidence, by means of which he first determined the 'reliability' of the witnesses. Sworn statements had been taken by the Federal Bureau of Investigation prior to the trial from many of A. C. employees, including those who appeared as witnesses. These statements were not part of the record of the case. Johnson sat throughout the trial with prepared cards on which had been summarized the previous statements, and as each witness testified his testimony was compared with the cards to ascertain his 'reliability'. Just how the differences were treated was not comprehensively explained, but 'in the event that the testimony of the witness differed' from the sworn statement which had been summarized on the cards, Johnson 'treated each case individually' and could not state 'in broad terms' his method. After having thus selected those witnesses whom he considered 'reliable', Johnson prepared a 'schedule' which constituted the foundation for his 'summarizing' testimony that for a given vessel A. C. had rendered invoices to Pioneer which were 'unsupported' both as to a specific number of men and an ascertained amount of money.

"(1) It is readily apparent that Johnson, in his attempt to strengthen the government's case, did more than 'summarize' the evidence. From materials and information extraneous to the record he confessedly determined the 'accuracy' of evidence already in the case, and 'eliminated' the 'inaccurate' evidence as well as the testimony of witnesses regarded by him as 'uncertain'. This, of course, was an erroneous method of proof. For while it can scarcely be gainsaid that voluminous records may be summarized, or that an expert may interpret and explain certain evidence in the case and on the basis of such evidence perform tasks beyond the training and experience of the layman juror, it is nevertheless axiomatic that the 'expert' may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility. Nor may expertness be the medium for injecting into the record material and information not a part of the expert's qualifications and otherwise inadmissible through his lips. Apropos is the statement we made in United States v. Michener, 3 Cir., 1945, 152 F.2d 880, 883: 'The admission into the evidence of the auditors' conclusions and opinions as distinguished from mere statements of fact summarizing what was observed by them in the records was erroneous. * * *' And it was in aggravation of the error for Johnson to base his determination of the value of the evidence in the case upon information which had been collected, and which could have been directly submitted to the jury for its appraisal."

See also: *United States* v. *Michener*, 152 F.2d 880, l.c. 883 (Third Circuit); *Cooper* v. *United States*, 9 F.2d 216 (Eighth Circuit); 135 A.L.R. 1141. In the *Michener* case, *supra*, the court held, l.c. 883:

"The admissions into the evidence of the auditor's conclusions and opinions as distinguished from mere statements of fact summarizing what was observed by them in the records was erroneous."

It is noted the decision in the *Michener* case was reversed and that in said case the testimony was from auditors regarding the detailed inspections of voluminous books and records and, if properly done, would have been proper testimony from expert witnesses. It is respectfully submitted that Exhibits 63 through 68 introduced at the trial of this matter were so prejudicial and erroneous and in conflict with time honored requirements in criminal cases as to require the prompt consideration of this Court.

**2. The Opinion of the Court of Appeals Is in Conflict with All Other Circuits in Holding That the Jury, in Finding Petitioner Guilty of the Conspiracy Count of the Indictment, Presumptively, Viewing the Evidence in the Light Most Favorable to the Government, Found Him Guilty of All the Fourteen Overt Acts Charged Therein, Which Included the Transportation of All of the Cars Described in the Other Six Substantive Counts of the Indictment.**

Another urgent and important reason for granting the requested writ in this case is the reasoning used by the Court of Appeals in getting around petitioner's contention there was a fatal variance between the allegations of the indictment in Counts II, IV and VII and the proof, and petitioner's further contention that the court erred in denying his motion for acquittal on Counts II, V, VI and VII, which were considered together. The court held that in considering the question of the sufficiency of the evidence it must review the evidence in a light most favorable to the Government. Although the overt acts in the conspiracy count of the indictment did not reflect serial numbers or positive descriptive data of the automobiles mentioned therein, the court held that the overt acts pertained to the transportation of the cars described in Counts II,

III, IV, V, VI and VII. The Court of Appeals then held, on page 5 of its opinion:

> "In this connection it should be borne in mind that the jury, in finding appellant guilty on Count I, presumptively, viewing the evidence in a light most favorable to the Government, found him guilty of all the overt acts charged. These overt acts pertained to the transportation of the cars described in Counts II, III, IV, V; VI and VII. Thus, overt act No. 1, charges that:
>
> > 'On or about July 9, 1957, Tom Don Franano and Frank Triola, Jr., transported a stolen 1957 Chevrolet from Kansas City, Missouri, to Denver, Colorado.' "

It is thus noted that the Court of Appeals apparently used the theory that conviction of petitioner on the conspiracy count automatically took care of the burden of proof and any fatal variances regarding the other six counts of the indictment. In the first place, the overt acts did not contain adequate descriptive data and statements of intent to be considered as identical with substantive counts. The more dangerous and shocking part of the Court of Appeals decision is, however, the statement that the jury in finding petitioner guilty of the conspiracy count, presumptively, viewing the evidence in a light most favorable to the Government, found him guilty of all the overt acts charged. The fact this theory is neither reasonable nor possible is best and most quickly illustrated by the fact the trial judge instructed the jury as follows (R. 417):

> "I might say before I read this list of overt acts that in a conspiracy count it is necessary to allege and prove at least one overt act in furtherance of the conspiracy, an act by one or more of the alleged conspirators."

Under the above instruction, how could it ever be said by anyone that finding petitioner guilty of the conspiracy

count found him guilty of *all* of the overt acts? It is respectfully submitted that allowing such a doctrine to stand will encourage the already existing desire on the part of Federal prosecutors to stick a conspiracy count into all of their indictments, with the resulting confusion and problems well illustrated by this case.

While it is most elementary law that in a conspiracy prosecution under a count containing many overt acts, to secure a conviction it is necessary to prove only one of the overt acts beyond a reasonable doubt, the following citations are respectfully submitted on this point: *United States* v. *Haug*, 21 F.R.D. 22, l.c. 17; *United States* v. *McGee*, 108 F. Supp. 909; *Short* v. *United States*, 91 F.2d 614, l.c. 618, C.C.A. 4th; *Jung Quey* v. *United States*, 222 Fed. 766 (C.C.A. 9th).

In view of the indictment in this case, the above specific instruction given by the trial court and the above citations, it is respectfully submitted that the opinion of the Court of Appeals is most erroneous; that it violates time honored requirements in all the other circuits; that it is on a subject of great importance to justice throughout the country and that petitioner's writ should be granted.

**3. This Court Should Consider the Growing Practice in Federal Courts, As Illustrated by This Case, of Charging Defendants in the Same Indictment or Information with Violation of Conspiracy and Substantive Statutes Regarding the Same Alleged Crimes for the Obvious Purpose of Getting into Evidence Data Not Otherwise Admissible and Thereby Creating the Confusion and Problems Resulting Therefrom.**

This case illustrates the unjust and unbelievable results occurring in United States District Courts which are allowing the Conspiracy statute to be used as an instrument

for getting into evidence all kinds of unrelated and confusing evidence of a prejudicial nature. not otherwise admissible, in the prosecution of cases under informations and indictments with both conspiracy and substantive counts arising out of the same subject matter. In this case there were six so-called substantive counts which were all included as overt acts in a conspiracy count, all tried together. The philosophy of "anything goes" which has resulted in allowing such procedures in Federal courts is undoubtedly responsible for the fact that in this case the court allowed a Special Agent of the Federal Bureau of Investigation to help straighten out the terrible confusion of the testimony from forty-nine witnesses and seventy-two exhibits by preparing and giving to the jury six so-called summary charts which resolved quickly and easily all of the problems the jury had to decide. As reflected in detail in the Statement above herein, these charts reflected selective items from conflicting evidence introduced at the trial; information not in evidence at the trial, conclusions, hearsay information taken from FBI reports not in evidence and argumentative data invading the province of the jury. In admitting these exhibits, the trial court said, as reflected on page 9 of the opinion of the Court of Appeals: "Certainly it is of value to the Court and jury in having the evidence pulled together in summary form. The objection overruled." In short, the Government is being allowed to pile up inferenee upon inference, suspicion upon suspicion, introduce all sorts of inadmissible evidence upon statements various data will be connected to show conspiracy activities—and is then allowed to furnish the jury with self-serving charts to help the jury out of its dilemma. Allowing the government ~~a defendant~~ to introduce testimoy of an "expert" witness to summarize the testimony of Government witnesses in chart form and on

such a basis usurps the province of the jury and offends against all sense of fairness and justice.

When defendants are convicted under this procedure although absolutely no evidence is introduced at the trial connecting them with the alleged crime, as petitioner's conviction of Count II herein, this does not appear to bother the courts or the Department of Justice. The fact that such a thing *can* happen in our Federal courts should, sooner or later, attract the attention of and call for action by this court. It is a terrible reflection on the procedures being allowed and followed in our Federal Courts. It is a problem which is of utmost importance throughout the Country and urgently needs consideration by this Court.

## CONCLUSION.

Wherefore, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Walter A. Raymond

WALTER A. RAYMOND and
KENNETH C. WEST,
*Counsel for Petitioner.*

Section 371, Title 18, United States Code, is as follows:

"Conspiracy to commit offense or to defraud United States.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Section 2312, Title 18, United States Code, is as follows:

"Transportation of stolen vehicles.

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

[1]* **UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

No. 16,071

Tom Don Franano, Appellant,

v.

United States of America, Appellee,

Appeal from the United States District Court for the Western District of Missouri.

[April 27, 1960.]

Before GARDNER, VOGEL, and VAN OOSTERHOUT, Circuit Judges.

GARDNER, Circuit Judge.

Appellant and three other persons were charged with violations of the so-called Dyer Act, Section 2312, Title 18, United States Code, in an indictment containing seven counts. The first count charged that defendants, four in number, conspired to transport stolen motor vehicles in interstate commerce, knowing them to be stolen. Fourteen overt acts were charged as committed pursuant to the con-

*Refers to original page of Opinion.

spiracy. Counts II through VII were substantive counts and charged the appellant Franano and his codefendant Frank Triola, Jr., with the interstate transportation of certain stolen 1957 Chevrolet automobiles.

[2] Appellant, prior to the opening of the trial, made a motion for leave to inspect and copy grand jury minutes, which motion was denied. The action was tried to the court and a jury. On the morning of the third day of trial, appellant interposed a motion for a mistrial based upon an article appearing in the Kansas City Times which was seen by one member of the jury panel. The motion was denied. At the close of the Government's testimony each of the defendants interposed a motion for acquittal. The motion of one of the defendants, who was included in the charge of conspiracy, was sustained but the motions of all the other defendants were denied. The three remaining defendants submitted no testimony and the case was submitted to the jury on instructions to which appellant saved certain exceptions and also excepted to the refusal of the court to give certain instructions requested by him. The three defendants were found guilty. One of the defendants, Jo Ann King, found guilty only on the conspiracy charge, was put on probation. The remaining defendants, Tom Don Franano and Frank Triola, Jr., on the verdicts of guilty returned by the jury, were sentenced to a term of four years concurrently on each of Counts I, II, and III, and to a term of four years on each of Counts IV, V, VI, and VII, these latter sentences to be served concurrently with each other, but consecutively to the terms on Counts I, II, and III, making a total sentence of eight years.

Appellant Tom Don Franano alone prosecutes an appeal and seeks reversal on the following grounds: (1) the trial court erred in overruling appellant's motion to in-

spect and copy grand jury minutes; (2) appellant's motion for judgment of acquittal on Counts II, IV, and VII should have been sustained on the grounds that there were fatal variances between the allegations of the indictment [3] and the proof; (3) the trial court erred in overruling appellant's motion for a mistrial; (4) the trial court erred in admitting Exhibits 63 through 68; (5) the court erred in refusing to give defendant's requested instructions Number 13 and 14 and in failing adequately to charge the jury that they must find all essential elements of the offenses charged beyond a reasonable doubt; (6) the trial court erred in admitting irrelevant and immaterial evidence having no probative value of the allegations of the indictment and in refusing to give defendant's requested instruction Number 10; and (7) the trial court erred in overruling appellant's motion for judgment of acquittal as to Counts II, V, VI, and VII on the grounds of the insufficiency of the evidence.

In support of his contention that the court erred in denying his motion for leave to copy the grand jury minutes, appellant urges that there was insufficient evidence before the grand jury to warrant his indictment, alleging that there was but one witness. The showing is far from proving this allegation. Witnesses who appear without being subpoenaed, or who appear pursuant to informal requests of the grand jury or the United States Attorney, do not appear on the records of the district court. It is also argued that the witness whose name did appear on the district court record could not have had personal knowledge of sufficient facts to warrant a finding of an indictment. Such a motion is addressed to the judicial discretion of the trial court and we think the appellant's contention is completely negatived by what is said in *Costello* v. *United States*, 8 Cir., 255 F.2d 389 and *Costello* v. *United States*, 350 U.S. 358.

In *Costello* v. *United States*, 8 Cir., 255 F.2d 389, referring to Rule 6 (e), Federal Rules of Criminal Procedure, Title 18, United States Code, we said:

[4] "A trial court unquestionably had the power under Rule 6 (e) of the Federad Rules of Criminal Procedure, 18 U.S.C.A., to order the grand jury proceedings transcribed and produced. Such power should be exercised only where there is a clear showing that the ends of justice require it. *Lawn* v. *United States*, 355 U.S. 339, 362, 78 S.Ct. 311, 2 L.Ed. 321; *Herzog* v. *United States*, 9 Cir., 226 F.2d 561, 566. No such showing was made here and we find no prejudice to either defendant resulting from the court's refusal to compel the production and no error."

In *Costello* v. *United States*, 350 U.S. 359, the Supreme Court, speaking on this question, said:

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

The contention of appellant as to the denial of his motion is, we think, wholly without merit.

We shall consider appellant's contention that there is a fatal variance between the allegations of the indictment in Counts II, IV, and VII and the proof, and his contention that the court erred in denying his motion for acquittal on Counts II, V, VI, and VII, together

In considering the question of the sufficiency of the evidence to sustain the judgment, we must view the evidence [5] in a light most favorable to the Government and we must assume as proved every fact the evidence, direct or circumstantial, tends to prove, and the Government as the prevailing party is entitled to the benefit of all such favorable inferences as may reasonably be drawn from the facts proved

In support of his contention that there was a fatal variance between the allegations of the indictment on Counts II, IV, and VII, and the proof, appellant relies strongly on the case of *Cox* v. *United States*, 8 Cir., 96 F.2d 41. That case is readily distinguishable on its facts from the instant case. In the *Cox* case the only proof of identity between the car stolen and the car described in the indictment was the serial number. In the instant case there was positive proof of identity regardless of and without reference to the serial marks. *Johnson* v. *United States*, 8 Cir., 195 F.2d 673; *United States* v. *Drexel*, 2 Cir., 56 F.2d 588. The variances were therefore not fatal and we deem it unnecessary to consider the other contentions as to the insufficiency of the evidence because invalidation of a particular count is immaterial if the sentence on that count runs concurrently with the sentence on a valid count. *Woodford* v. *United States*, 8 Cir., 77 F.2d 861; *Brooks* v. *United States*, 267 U.S. 432.

In this connection it should be borne in mind that the jury, in finding appellant guilty on Count I, presumptively, viewing the evidence in a light most favorable to the Government, found him guilty of all the overt acts charged. These overt acts pertained to the transportation of the cars described in Counts II, III, IV, V, VI, and VII. Thus, overt act No. 1 charges that

"On or about July 9, 1957, Tom Don Franano and Frank Triola, Jr. transported a stolen 1957 Chevrolet from Kansas City, Missouri to Denver, Colorado."

[6] This is the transportation described in Count II of the indictment. Overt act No. 2 likewise describes the transportation charged in Count III of the indictment; Overt act No. 4 charges the transportation charged in Count IV of the indictment; Overt act No. 7 charges the transportation charged in Count V of the indictment; Overt act No. 9 charged the transportation charged in Count VI of the indictment; Overt act No. 14 charged the transportation charged in Count VII of the indictment. Other overt acts charge various circumstances connected with the transportation of the automobiles described in the various counts in the indictment, such as:

"Overt Act No. 3. That on or about August 13, 1957, Tom Don Franano and Frank Triola, Jr. went to Pierre, South Dakota where they obtained fraudulent titles for two stolen motor vehicles.

* * *

"Overt Act No. 5. On or about August 30, 1957, Jo Ann King went to Russellville, Alabama and obtained two fictitious registrations for automobiles.

"Overt Act No. 6. On or about September 12, 1957, Tom Don Franano and Frank Triola, Jr. went to Jefferson City, Missouri and obtained a fraudulent title for a stolen automobile."

There was proof that the car described in each count of the indictment was stolen from the owner and that it was sold by appellant or one of his co-conspirators in another state and there was proof that the appellant, or one of his co-conspirators, fraudulently procured from various states evidence of title for each of the cars described in the indictment.

Appellant was sentenced to four years on each count of the indictment. The aggregate sentence was eight years. The sentence on the conspiracy count is not challenged [7] and we have held that there was no fatal variance between the proof and the allegations of the indictment in the fourth count, and these counts run consecutively. We therefore pretermit consideration of the other contentions of the insufficieny of the evidence.

We think the evidence fairly shows that the defendants, in committing the offenses charged, proceeded about as follows: They would first remove or steal from a 1957 Chevrolet the identification plate which was spot-welded to the left front door post. They would then go to the State of Alabama or some other state wherein the law permits registration of vehicles without issuance of an actual title. A vehicle registration would thus be fraudulently obtained in that state for a vehicle bearing the identifying description shown on the stolen serial plate. The registration papers obtained in Alabama would then be taken to another state, and a genuine title obtained by surrender of the Alabama registration. A new 1957 Chevrolet, identical in body style and general description to the vehicle described on the title papers would then be stolen. The stolen identification plate would be substituted and the vehicle would then be taken to another state and sold by using the title papers which were obtained as outlined above.

On the morning of the third day of trial a newspaper article reported certain portions of the testimony that had been introduced and received in evidence the preceding day. The article, however, added that one of the parties mentioned in the testimony, who was a stepbrother of appellant's co-defendant Triola, was "an underworld character * * * who served prison sentences on income tax eva-

sion and who was an associate of the late Charles Binnagio." This newspaper article was called to the attention [8] of the court by counsel for appellant, who moved for a mistrial. The court thereupon inquired of the jurors as to whether any of them had seen the article relating to the case. Only three jurors made answer. Two stated they did not see the article. One stated that he saw it, but did not read it. The motion was overruled and appellant urges this as reversible error.

What is said by us in *Gicinto* v. *United States*, 8 Cir., 212 F.2d 8, is here apposite:

> "It will be noted that counsel for defendant did not ask that the jury be polled or interrogated in regard to the article, and there is no evidence that it was read by the jurors or that any of them were influenced in any way by it. The appellant relies upon *Marson* v. *United States*, 6 Cir., 203 F.2d 904, but the facts in that case are different and it is not in point here. Even if the jurors read the article referred to, that alone is not ground for a new trial. *Bratcher* v. *United States*, 4 Cir., 149 F.2d 742; *United States* v. *Katz*, 3 Cir., 173 F.2d 116. The burden was upon counsel for defendant to show that prejudice resulted, and he failed to establish such prejudice."

We think the court properly denied the motion for a mistrial.

Complaint is made before this Court of the admission into evidence of Exhibits 63 through 68. Those exhibits were summaries prepared by an F. B. I. agent who had been present through the trial of the case. Each exhibit related to a different automobile described in a particular count of the indictment. It contained information as to the model of the automobile, the confidential serial number, the altered serial number, the source from which taken

and the place of recovery, and included information as to the titles issued on such vehicle.

[9] The evidence was very voluminous and largely circumstantial. During the trial forty witnesses were examined and some seventy-two exhibits were admitted in evidence. The exhibits were based upon the testimony received in evidence and the court admitted them. In doing so the court said:

> "Certainly it is of value to the Court and jury in having the evidence pulled together in summary form. The objection overruled."

The trial judge was in position to know whether these exhibits would be of assistance to the jury and we think there was no abuse of discretion in admitting them. The witness testified that there was nothing in the exhibits which had not already been introduced into evidence and we think the ruling was not prejudicial. Under somewhat similar circumstances expert testimony has been admitted to summarize and make computations from documentary evidence.

No complaint is made as to the instructions as given but it is contended that the court erred in refusing to give certain instructions requested by appellant to the effect that to warrant a conviction the proof must show beyond a reasonable doubt that appellant knew the vehicles were stolen and that he subsequently transported them in interstate commerce. We have carefully examined the instructions as a whole. They very plainly advise the jury that knowledge that the vehicle transported was in fact stolen was essential to warrant conviction. The instructions meticulously advise the jury as to all the ingredients of the offenses charged and of the necessity of making proof of every element constituting the offense. The giving of

the requested instructions could only have emphasized the instruction as given and it is not conceivable that the refusal to give the requested instruction was prejudicial.

[10] It remains to consider the contention that the court committed prejudicial error in admitting irrelevant and immaterial evidence having no probative value of the allegations of the indictment, and in refusing to give appellant's requested instruction No. 10. In other portions of his brief counsel charges that eleven exhibits were admitted which bore no relation to the charges in the indictment. We are not advised as to the contents or character of these exhibits. Our Rule 11 (b) among other things provides that if complaint is made as to the admissibility of evidence, the brief of appellant shall "quote the evidence referred to, and any objections or other equivalent action taken relative thereto, together with the rulings of the court thereon, giving the pages of the printed record on which the quotations appear."

The statement contained in the brief presents nothing for our consideration. We have, however, examined the original transcript and note that the court admitted the exhibits on the assurance by Government counsel that they would be connected up. If counsel for appellant thought they were not connected up with the charges contained in the indictment, it was incumbent upon him to move to strike them, and we assume that they were such as to be relevant and material as it is incumbent upon the appellant to demonstrate that prejudicial error has been committed.

The claim is made that the court erred in not giving requested instruction No. 10 to the effect that the jury was concerned only with the charges contained in the indictment and with the automobiles involved. There was no

exception taken to the refusal of this instruction and the subject of it was fully covered in the instructions given by the court.

[11] We have examined the entire record in this case and are convinced that appellant had a fair and impartial trial and that the court in the course of the trial committed no prejudicial error. The judgment appealed from is affirmed.

A true copy.

Attest:

Robert C. Tucker,
*Clerk, U. S. Court of Appeals,*
*Eighth Circuit.*

By /s/ Lillian W. McDermott,
Chief Deputy Clerk.

(Seal)

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION**

United States of America,

*Plaintiff,*

vs.

Tom Don Franano,
Frank Triola, Jr.,
Sam Triola,
Jo Ann King,

*Defendants.*

Section 371, Title 18, U.S.C.
Section 2312, Title 18, U.S.C.

**Indictment.**

The Grand Jury charges as follows:

COUNT I.

That on and between the dates of July 1, 1957, and November 30, 1957, in the Western Division of the Western District of Missouri, Tom Don Franano, Frank Triola, Jr., Sam Triola and Jo Ann King did enter into an agreement, confederation and conspiracy to commit an offense against the United States of America, to wit, violate Section 2312, Title 18, United States Code, that is to say, the defendants did conspire, confederate and agree to transport and cause to be transported in interstate commerce certain stolen motor vehicles, well knowing said vehicles to have been stolen; that for the purpose of executing and effecting such conspiracy and in attempting to do so the defendants committed the following overt acts, to wit.

OVERT ACT No. 1.

On or about July 9, 1957, Tom Don Franano and Frank Triola, Jr. transported a stolen 1957 Chevrolet from Kansas City, Missouri to Denver, Colorado.

OVERT ACT No. 2.

That on or about August 9, 1957, Tom Don Franano and Frank Triola, Jr. transported a stolen motor vehicle from Kansas City, Missouri to Denver, Colorado.

OVERT ACT No. 3.

That on or about August 13, 1957, Tom Don Franano and Frank Triola, Jr. went to Pierre, South Dakota where they obtained fraudulent titles for two stolen motor vehicles.

OVERT ACT No. 4.

On or about August 22, 1957, Tom Don Franano and Frank Triola, Jr. transported a stolen motor vehicle from Kansas City, Missouri to Denver Colorado.

OVERT ACT No. 5.

On or about August 30, 1957, Jo Ann King went to Russellville, Alabama and obtained two fictitious registrations for automobiles.

OVERT ACT No. 6.

On or about September 12, 1957, Tom Don Franano and Frank Triola, Jr. went to Jefferson City, Missouri and obtained a fraudulent title for a stolen automobile.

OVERT ACT No. 7.

On or about September 16, 1957, Tom Don Franano and Frank Triola, Jr. transported in interstate commerce from Kansas City, Missouri to Denver, Colorado a stolen motor vehicle.

OVERT ACT No. 8.

On or about September 24, 1957, Jo Ann King went to Pierre, South Dakota and to Sioux Falls, South Dakota.

OVERT ACT No. 9.

On or about October 31, 1957, Tom Don Franano and Frank Triola, Jr. transported in interstate commerce from St. Paul, Minnesota to Kansas City, Missouri a stolen motor vehicle.

OVERT ACT No. 10.

On or about November 1, 1957, Tom Don Franano and Sam Triola went to Troostwood Motors, Kansas City, Missouri, to cash a check.

OVERT ACT No. 11.

On or about November 7, 1957, Tom Don Franano and Jo Ann King went to Memphis, Tennessee.

OVERT ACT No. 12.

On or about November 16, 1957, Tom Don Franano and Sam Triola went to Collierville, Tennessee.

OVERT ACT No. 13.

On or about November 22, 1957, Tom Don Franano and Frank Triola, Jr., together with a third person to the grand jury unknown, met in a 1957 Chevrolet in Kansas City, Missouri.

OVERT ACT No. 14.

On or about November 22, 1957, Tom Don Franano and Frank Triola, Jr. transported in interstate commerce from Collierville, Tennessee to Kansas City, Missouri a stolen motor vehicle.

COUNT II.

That on or about July 9, 1957, in the Western Division of the Western District of Missouri, Tom Don Franano and Frank Triola, Jr. transported and caused to be transported in interstate commerce from Kansas City, Missouri to Denver, Colorado a certain stolen motor vehicle, to wit, a 1957 Chevrolet, with true serial number 57K165361 and bearing ficititious serial number VC57K156212, well knowing the same same to have been stolen.

COUNT III.

That on or about August 9, 1957, in the Western Division of the Western District of Missouri, Tom Don Franano and Frank Triola, Jr. transported and caused to be transported in interstate commerce from Kansas City, Missouri to Denver, Colorado a certain stolen motor vehicle, to wit, a 1957 Chevrolet, with true serial number 57K177579 and bearing fictitious serial number VC57S170126, well knowing the same to have been stolen.

COUNT IV.

That on or about August 22, 1957, in the Western Division of the Western District of Missouri, Tom Don Franano and Frank Triola, Jr. transported and caused to be transported in interstate commerce from Kansas City, Missouri to Denver, Colorado a certain stolen motor vehicle, to wit, a 1957 Chevrolet, with true serial number 57K165768 and bearing fictitious serial number VC57A106781, well knowing the same to have been stolen.

COUNT V.

That on or about September 16, 1957, in the Western Division of the Western District of Missouri, Tom Don Franano and Frank Triola, Jr. transported and caused to

be transported in interstate commerce from Kansas City, Missouri to Denver, Colorado a certain stolen motor vehicle, to wit, a 1957 Chevrolet, with true serial number 57K190622 and bearing fictitious serial number VC57N100604, well knowing the same to have been stolen.

COUNT VI.

That on or about October 31, 1957, in the Western Division of the Western District of Missouri, Tom Don Franano and Frank Triola, Jr. transported and caused to be transported in interstate commerce from St. Paul, Minnesota to Kansas City, Missouri a certain stolen motor vehicle, to wit, a 1957 Chevrolet, with true serial number 57J285549 and bearing fictitious serial number VB57S240202, well knowing the same to have been stolen.

COUNT VII.

That on or about November 22, 1957, in the Western Division of the Western District of Missouri, Tom Don Franano and Frank Triola, Jr. transported and caused to be transported in interstate commerce from Collierville, Tennessee to Kansas City, Missouri a certain stolen motor vehicle, to wit, a 1957 Chevrolet, with true serial number 57S309074 and bearing fictitious serial number VC57S-301713, well knowing the same to have been stolen.

A True Bill

Foreman.

Joseph L. Flynn,
Assistant United States Attorney.

**EXHIBIT No. 63.**

COUNT NUMBER 2.

| | |
|---|---|
| Model | 1957 Chevrolet |
| Confidential Serial Number | 57K165366 |
| Altered Public Serial Number | VC57K156212 |
| Car Taken From | Union Chevrolet Company, Kansas City, Missouri, on July 8, 1957. |
| Car Recovered | Casper, Wyoming December 18, 1957 |
| Title History | (1) Alabama registration certificate issued June 26, 1957, at Russellville, Alabama<br>(2) Titled to T and F Motors, Kansas City, Missouri, at Jefferson City, Missouri on July 11, 1957, upon surrender of above Alabama registration certificate. |

**EXHIBIT No. 64.**

COUNT NUMBER 3.

| | |
|---|---|
| Model | 1957 Chevrolet |
| Confidential Serial Number | 57K177579 |
| Altered Public Serial Number | VC57S170126 |
| Car Taken From | Van Chevrolet Company, Kansas City, Missouri, between August 6 and 14, 1957. |
| Recovered | Colorado Springs, Colorado, on February 13, 1958. |
| Title History | (1) Alabama registration certificate issued at Moultor, Alabama, on August 2, 1957.<br>(2) Illinois title issued August 9, 1957, upon surrender of above Alabama registration certificate. |

**EXHIBIT No. 65.**

COUNT NUMBER 4.

| | |
|---|---|
| Model | 1957 Chevrolet |
| Confidential Serial Number | 57K165786 |
| Altered Public Serial Number | VC57A106781 |
| Car Taken From | Dumas Milner Chevrolet Company, Kansas City, Missouri, between August 8 and 31, 1957. |
| Recovered | Billings, Montana, January 29, 1958. |
| Title History | (1) Alabama registration certificate issued at Tuscumbia, Alabama, on August 2, 1957.<br>(2) Titled at Pierre, South Dakota, on August 14, 1957. |

**EXHIBIT No. 66.**

COUNT NUMBER 5.

| | |
|---|---|
| Model | 1957 Chevrolet |
| Confidential Serial Number | 57K190622 |
| Altered Public Serial Number | VC57N100604 |
| Car Taken From | Van Chevrolet Company, Kansas City, Missouri, between September 12, 1957, and October 15, 1957. |
| Car Recovered | Wibaux, Montana, on January 30, 1958. |
| Title History | (1) Alabama registration certificate issued at Russellville, Alabama on August 30, 1957.<br>(2) Titled at Jefferson City, Missouri, September 12, 1957, upon surrender of above Alabama registration certificate. |

**EXHIBIT No. 67.**

COUNT NUMBER 6.

| | |
|---|---|
| Model | 1957 Chevrolet |
| Confidential Serial Number | 57J285549 |
| Altered Public Serial Number | VB57S240202 |
| Car Taken From | St. Paul, Minnesota, between October 1, 1957, and October 31, 1957. |
| Recovered | Kansas City, Missouri, on November 26, 1957. |
| Title History | (1) Alabama registration certificate issued at Russellville, Alabama on August 30, 1957.<br>(2) Titled in South Dakota, on September 24, 1957, upon surrender of the above Alabama registration certificate.<br>(3) Titled at Jefferson City, Missouri, on October 29, 1957, upon surrender of the above South Dakota title. |

**EXHIBIT No. 68.**

COUNT NUMBER 7.

| | |
|---|---|
| Model | 1957 Chevrolet |
| Confidential Serial Number | 57S309074 |
| Altered Public Serial Number | VC57S301713 |
| Car Taken From | Kelsey Chevrolet Company, Collierville, Tennessee, between November 16, 1957, and November 18, 1957. |
| Recovered | Kansas City, Missouri, November 22, 1957. |
| Title History | (1) Alabama registration certificate issued at Tuscumbia, Alabama, on November 11, 1957.<br>(2) Kansas title issued on November 21, 1957, upon surrender of the above Alabama registration certificate. |

## JUDGMENT.

(Filed April 27, 1960, Robert C. Tucker, Clerk.)

## UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 16,071. September Term, 1959.

Tom Don Franano, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Western District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Tom Don Franano, do surrender himself to the custody of the United States Marshal for the Western District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

April 27, 1960.

COPY

No. 286

# In the Supreme Court of the United States

OCTOBER TERM, 1960

TOM DON FRANANO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
*Solicitor General,*
MALCOLM RICHARD WILKEY,
*Assistant Attorney General,*
BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
*Attorneys, Department of Justice,*
*Washington 25, D.C.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 286

TOM DON FRANANO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Vol. IV, 1–11; Pet. App. 2–12) is reported at 277 F. 2d 511.[1]

[1] The record consists of six volumes. Volumes I and II, which are consecutively paginated, constitute the reporter's transcript of the trial, and will be referred to as "Tr." Volume III is a supplemental transcript, which is separately paginated, and will be referred to as "Vol. III." Volume IV and V constitute, respectively, the proceedings in the court of appeals and the pleadings and papers filed in the district court, and will be referred to as "Vol. IV" and "Vol. V," respectively. Volume VI contains selected government exhibits introduced into evidence at the trial, and will be referred to as "G. Ex.", together with the appropriate exhibit number.

## JURISDICTION

The judgment of the court of appeals was entered on April 27, 1960 (Vol. IV, 12). A petition for rehearing was denied on June 3, 1960 (Vol. IV, 16). Mr. Justice Whittaker extended the time for filing a petition for a writ of certiorari to August 2, 1960, and the petition was filed on August 1, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that there were no fatal variances as between the allegations in three counts and the proof at the trial.

2. Whether it was proper to charge petitioner with conspiracy to violate the "Dyer Act" and with substantive violations of that Act.

3. Whether the trial court properly allowed the jury to consider summaries of the Government's evidence relating to individual stolen cars.

## STATEMENT

A seven-count indictment returned in the United States District Court for the Western District of Missouri charged petitioner and three others (Count I) with conspiring to transport in interstate commerce motor vehicles known to have been stolen, in violation of the "Dyer Act", 18 U.S.C. 2312 (Vol. V, 4–6; Pet. App. 13–15). Counts II through VII were substantive counts and charged petitioner and Frank Triola with the interstate transportation of certain stolen 1957 Chevrolets. Following a trial by jury, petitioner and Frank Triola were found guilty on all counts as charged, and Defendant Jo Ann King was found guilty

on Count I as charged (Vol. III, 4–5; Vol. V, 90–92).[2] Petitioner was sentenced to serve a term of imprisonment of four years on each of Counts I, II and III, the sentences to run concurrently with each other (Group I), and to serve a term of imprisonment of four years on each of Counts IV, V, VI and VII (Group II), the sentences on these counts to run concurrently with each other, but consecutive to the sentences imposed on the counts in Group I (a total of eight years' imprisonment) (Vol. V, 104). On appeal, the court of appeals unanimously affirmed petitioner's conviction. 277 F. 2d 511.[3]

The pattern of the evidence on the substantive counts is illustrated by that relating to Counts III and IV (which, taken alone, will support the sentence imposed).

*Count III:* Some time after July 24, 1957, a 1957 Chevrolet was stolen from a storage lot in Kansas City, Missouri (Tr. 217–218). On August 2, 1957, "Don W. Renald" of Moulton, Alabama, obtained an Alabama registration for a 1957 Chevrolet which was described by the same serial number as that missing from a 1957 Chevrolet in Memphis, Tennessee (Tr. 220–221, 224, 226–227; G. Ex. 50).[4] The

[2] The trial judge granted defendant Sam Triola's motion for judgment of acquittal (Tr. 404–405, 407–408).

[3] Petitioner is the only defendant who appealed his conviction.

[4] Mr. Timothy Adams, a superintendent at a Chevrolet plant in Missouri, testified concerning the serial number identification procedure on the Chevrolet automobiles (Tr. 95–109). Each vehicle produced is assigned a different serial number, which is preceded by certain prefixes. The figure "57" indicates the year that the car is produced; the letter following the

public serial number plate from the Memphis car was substituted for the public serial number on the stolen Chevrolet (Tr. 251–253). Shortly thereafter, petitioner brought certain automobile papers of "Don W. Renolds" for notarization before a notary public in Clay County, Missouri (Tr. 347–350, 352). On August 6, 1957, "Don W. Renaldo" applied for an Illinois title and registration, on surrender of the Alabama registration (Tr. 239–242; G. Ex. 50). As representatives of "T & F Motors", petitioner and Frank Triola subsequently sold the stolen Chevrolet to a used car dealer in Denver, Colorado (Tr. 164–167, 251–252; G. Ex. 28).

*Count IV:* On August 2, 1957, "George Rogers" of Route 1, Tuscumbia, Alabama, obtained an Alabama registration for a 1957 Chevrolet described with the same public serial number as that which was missing from a 1957 Chevrolet in Springfield, Missouri (Tr. 254–255, 260–261; G. Ex. 52). This public serial number was substituted for the public

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year designation indicates the assembly plant; and the last six digits indicates the actual number of the vehicle in question. This number is stamped at two points on the frame of the vehicle (Tr. 99). The number appearing on the frame is known as the "confidential" or "hidden" serial number. In addition, the same serial number, together with further prefixes indicating the body style and motor type of the particular car, is stamped on a metal plate which is spot welded to the door post of the car (Tr. 98, 103–104). This number is referred to as the "public" serial number. The "confidential" serial number and the "public" serial number are identical in all respects except that the "public" serial number contains the added prefixes denoting the body style and motor type of the particular car (Tr. 102, 105–106).

serial number on a 1957 Chevrolet which was subsequently stolen in Kansas City, Missouri (Tr. 279–283, 332–333). On August 14, 1957, petitioner, using the name "George Rogers",[5] applied for a South Dakota title to the automobile described in the Alabama registration (Tr. 268–270, 273, 275, 277).[6] A few days later, petitioner and Frank Triola, as representatives of "D & G Motors," sold the stolen Chevrolet to a used car dealer in Denver, Colorado (Tr. 168–172). The used car dealer made his check payable to "V & G Motors." Petitioner endorsed this check with the name "Vic De Grego" (Tr. 171–174).[7] The scheme of the defendants is summarized by the opinion below as follows (Pet. 8a): "They would first remove or steal from a 1957 Chevrolet the identification plate which was spot-welded to the left front door post. They would then go to the State of Alabama or some other state wherein the law permits registration of vehicles without issuance of an

[5] Petitioner also had certain automobile papers for "George Rogers" and "Fred L. Potitte" notarized before a notary public in Clay County, Missouri (Tr. 347–358). Using the name "Fred L. Potitte," Frank Triola, on August 14, 1957, applied for a South Dakota title and registration to an automobile, on surrender of an Alabama registration to that automobile issued to "Fred L. Potitte" of Moulton, Alabama (Tr. 264–265, 270; G. Ex. 54). An FBI agent testified that there was no "Fred L. Potitte" of Moulton, Alabama (Tr. 341).

[6] Although a South Dakota registration was issued on August 14, 1957, apparently no South Dakota title was issued for this Chevrolet. The car was subsequently titled in Montana (Tr. 259–261; G. Ex. 52).

[7] Petitioner and Jo Ann King used the name "De Grego" in registering in various hotels and motels in 1957, and on one occasion, in obtaining a South Dakota driving permit (Tr. 36, 38–39, 342–344, 392–396; G. Exs. 69, 70, 72).

actual title. A vehicle registration would thus be fraudulently obtained in that state for a vehicle bearing the identifying description shown on the stolen serial plate. The registration papers obtained in Alabama would then be taken to another state, and a genuine title obtained by surrender of the Alabama registration. A new 1957 Chevrolet, identical in body style and general description to the vehicle described on the title papers would then be stolen. The stolen identification plate would be substituted and the vehicle would then be taken to another state and sold by using the title papers which were obtained as outlined above."

**ARGUMENT**

1. In the court below, petitioner argued (1) that there was a fatal variance between the allegations in the indictment and the proof at the trial regarding Counts II, IV and VII, because of differences in the serial numbers of the vehicles, and (2) that the evidence was insufficient to support his conviction on Counts II, V, VI and VII. In disposing of these contentions, the court below held that the variances were not fatal inasmuch as "there was positive proof of identity [of the cars] regardless of and without reference to the serial marks," and that it was not necessary to consider the contention as to insufficiency of the evidence since "invalidation of a particular count is immaterial if the sentence on that count runs concurrently with the sentence on a valid count." 277 F. 2d at 514. The court then said (277 F. 2d at 514), "In this connection it should be borne in mind that the jury, in finding appellant guilty on

Count I, presumptively, viewing the evidence in a light most favorable to the Government, found him guilty of all the overt acts charged. These overt acts pertained to the transportation of the cars described in Counts II, III, IV, V, VI, and VII." Petitioner contends (Pet. 16–18) that the court below employed this "reasoning" in "getting around" his contentions of variance and insufficiency of the evidence. The contention is without foundation.

The sentence on the conspiracy count (Count I) runs concurrently with that on Count III which petitioner did not attack at all. Count III supports the first of the consecutive four-year sentences, so that it is unnecessary to consider the conspiracy count.*

As to Count IV, the only challenge to the evidence on that count is the claim of variance. Count IV charged the petitioner and Frank Triola with having transported or caused the transportation from Kansas City, Missouri, to Denver, Colorado, of a 1957 Chevrolet having a "true" serial number 57K165768 and a fictitious serial number VC57A106781. The proof indicated that the confidential serial number was 57K165786, and that petitioner obtained a Missouri title and, with assistance from Triola, sold the

*Since the jury did find petitioner and Triola guilty on the six substantive counts, it is reasonable to assume that the jury found that these acts, alleged as overt acts in the conspiracy count, had been committed in furtherance of the conspiracy. This probably gave rise to the statement by the court of appeals that conviction of the conspiracy represented a finding of guilty on all the overt acts—the court apparently overlooking the fact that additional overt acts were also alleged.

car under the fictitious number alleged (see Statement, *supra*, p. 5).

The court below met the issue of variance and properly held that there was no fatal variance between the allegations and the proof. The indictment sufficiently identified the car and the transportation to enable petitioner to prepare his defense and to protect him from double jeopardy. Cf. *Johnson* v. *United States*, 195 F. 2d 673, 675 (C.A. 8); *United States* v. *Drexel*, 56 F. 2d 588, 589 (C.A. 2).

2. Petitioner complains (Pet. 18–20) of the use of the conspiracy statute "as an instrument for getting into evidence all kinds of unrelated and confusing evidence of a prejudicial nature." We submit, however, that this case reflects a proper use of the conspiracy charge. The instant scheme could not have been successfully executed without elaborate collaboration between various individuals at differing times and places. The obtaining of legitimate public serial number plates from 1957 Chevrolets, the registration of these plates in Alabama, the actual stealing of 1957 Chevrolets and the substitution of the registered public serial number plates for the original public serial number plates on the stolen cars, the application for and acquisition of state automobile titles on the basis of the Alabama registrations, and the interstate transportation and sale of the stolen cars required the coordinated efforts of many. The fact that the proof was somewhat complicated arises from the elaborateness of the scheme which petitioner and the other defendants joined.

3. At the trial, which lasted three days, forty-nine witnesses testified for the government, and 72 exhibits were introduced into evidence. F.B.I. Agent Alvey, who sat at the table with government counsel throughout the trial (Tr. 3, 381), made six summaries covering the evidence introduced regarding each stolen Chevrolet (Tr. 381–390). Each summary listed the model of the car, the "confidential" serial number, the altered "public" serial number, when and where the car was stolen, when and where the car was recovered, and when and where the car was registered and titled under the altered "public" serial number (Gov. Exs. 63–68; Pet. App. 18–23). Agent Alvey testified that the summaries represented a synopsis of his notes of the evidence at the trial which he "checked" against his F.B.I. report (Tr. 281–282). Petitioner argues that four of the six summaries contain matters which were not testified to at the trial and that a fifth summary involved a "selective conclusion" on the part of Agent Alvey as to evidence adduced at the trial (Pet. 6–8). The contention is insubstantial.

Petitioner does not challenge Government Exhibit Number 63, (the summary relating to Count II), nor does he challenge any of the statements in the remaining summaries with respect to the model of the car, the "confidential" serial number, the altered "public" serial number, where the car was stolen, where the car was recovered, and the title history of the car following its registration under the altered "public" serial number in Alabama. Rather, petitioner challenges the evidentiary basis of statements in certain of the exhibits, as to when the cars were stolen and re-

covered.[9] Since the gravamen of the charges against petitioner was his having transported (or having caused the transportation) in interstate commerce of motor vehicles known by him to have been stolen, the precise dates of theft and recovery are not important. Moreover, petitioner was not prejudiced by the dates shown in the questioned exhibits, since, at the least, they closely approximated the evidence at the trial. The exhibits in question, supported by the evidence in every material particular, were properly introduced as an aid to the jury which might be used in correlating a mass of complicated testimony and exhibits. Cf. *United States* v. *Johnson*, 319 U.S. 503, 519; *United States* v. *Schenck*, 126 F. 2d 702, 709 (C.A. 2),

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[9] Thus, petitioner states that the evidence indicated that the "last check" of the car involved in Count III was on July 29, 1957, whereas Government Exhibit 64 states that that car was taken from a certain company "between August 6 and 14, 1957" (Pet. 7); that the evidence indicated that the car involved in Count IV was reported missing on September 9, 1957, whereas Government Exhibit 65 states that the car was taken from a certain company between "August 8 and 13, 1957" (Pet. 7); that there was no evidence adduced as to when the car involved in Count IV was recovered, whereas Government Exhibit 65 states that it was recovered on "January 29, 1958" (Pet. 7); that there was no evidence introduced at the trial to support the statement in Government Exhibit 66 that the car involved in Count V was taken "between September 12, 1957, and October 15, 1957" (Pet. 7); that no evidence was introduced to support the dates when the car involved in Count VI was stolen or recovered (Pet. 8); and that the "confidential" serial number of the car involved in Count VII as stated by Government Exhibit 67 was a "selective conclusion" of Agent Alvey "since there was conflict in the evidence as to the serial number on the vehicle" (Pet. 6–7).

certiorari denied *sub nom. Moskowitz* v. *United States*, 316 U.S. 705; *Graves* v. *United States*, 191 F. 2d 579 (C.A. 10).

## CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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AUGUST 1960.

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

## No. 286.

TOM DON FRANANO,
*Petitioner,*

vs.

UNITED STATES OF AMERICA.

**PETITION FOR REHEARING ON ORDER DENYING PETITION FOR WRIT OF CERTIORARI.**

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**PETITION FOR REHEARING ON ORDER DENYING PETITION FOR WRIT OF CERTIORARI.**

Comes now Petitioner herein and respectfully moves the Court to set aside its order denying a writ of certiorari herein, entered on October 10, 1960, and grant petitioner a rehearing on his petition for a writ of certiorari for the following reasons and substantial grounds which were available to petitioner although not previously presented.

I.

**The Government's Use of Summary Charts at the Trial of This Matter, Going to All Counts of the Indictment, Reflecting Information and Data Not in Evidence at the Trial Was in Violation of Petitioner's Rights under the Sixth Amendment of the United States Constitution to Be Confronted with the Witnesses Against Him.**

As reflected in detail on pages 5 to 8, inclusive, of the Statement and on pages 13 to 16, inclusive, as the first point under "Reasons for Granting the Writ" in the original Petition for a Writ of Certiorari filed herein, Exhibits 63 through 68 introduced at the trial of this matter, which went to every count of the indictment, were charts prepared on a non-expert basis by a Special Agent of the Federal Bureau of Investigation. These contained purely hearsay information, as obtained by this Agent from reading investigative reports submitted by other agents and from listening to witnesses at the trial. These exhibits or summaries, which were undoubtedly given much weight by the jury, reflected selective items from conflicting evidence introduced at the trial, *information not appearing in the record* and not obtainable from the record of the trial and, in short, gave the jury hearsay evidence and resolved many questions of fact for the jury.

It thus appears that hearsay evidence was introduced at the trial by the above charts, over objections, which put before the jury evidence from witnesses petitioner was not allowed to confront or cross-examine in violation of his rights under the Sixth Amendment to the Constitution of the United States. This amendment, in part, states that in all criminal prosecutions, the accused shall enjoy the right * * * "to be confronted with the witnesses against him".

*Brown* v. *United States*, (C.C.A. 6th) 234 F.2d 140, affirmed 78 S. Ct. 622, 356 U.S. 148, 2 L. Ed. 589, rehearing denied 78 S. Ct. 776, 356 U.S. 948, 2 L. Ed. 2d 822, is authority for the fact that the provision of the Sixth Amendment of the Federal Constitution pertaining to the right of an accused to be confronted by witnesses against him imports the constitutional privilege to cross-examine the opposing witness. This is, of course, elementary law, and no effort is being made to list the many other cases available on the same point.

When the government was allowed to introduce evidence at the trial in the nature of charts showing data not otherwise in the record, petitioner certainly had no opportunity to confront or cross-examine the witnesses from whom such data were obtained, or to even learn the identity of such witnesses, and it is respectfully submitted his rights under the said Sixth Amendment were violated.

II.

**Petitioner's Convictions Were in Violation of His Rights under the Sixth Amendment of the United States Constitution to Be Informed of the Nature and Cause of the Accusation Where There Were Specific Variances in Identification Numbers of the Automobiles Described in Counts II, IV and VII of the Indictment and Proof Introduced at the Trial.**

As reflected in detail on pages 9 and 10 of the Statement in the Petition for a Writ of Certiorari filed herein, there were discrepancies between identifying numbers and the evidence as to three of the seven counts. No effort was made to identify instant automobiles at the trial other than by numbers and these were different under the evidence at the trial than alleged in Counts II, IV and VII of the indictment.

The Sixth Amendment to the United States Constitution states that in all criminal prosecutions, the accused shall * * * "be informed of the nature and cause of the accusation".

Federal indictments cannot be amended without violation of the rights of an accused under the Fifth Amendment of the United States Constitution, as most recently pointed out in *United States* v. *Stepp*, 144 F. Supp. 826, and it is respectfully submitted that where three out of seven counts in an indictment involving numerous similar automobiles are incorrect, petitioner was seriously prejudiced.

III.

**Petitioner's Convictions under Counts II, V, VI and VII Were in Violation of His Rights under the Sixth Amendment of the United States Constitution Since There Was No Evidence of Venue Introduced at the Trial or in the Record Showing That Petitioner Committed the Alleged Crimes in the Western District of Missouri.**

As pointed out in detail on pages 10, 11 and 12 of the Petition for a Writ of Certiorari filed herein, there was no evidence introduced at the trial of this matter to connect him with the offenses alleged in Counts II, V, VI and VII of the indictment and there was absolutely *no* evidence of any sort introduced at the trial to connect him in any manner whatsoever with the crime alleged in Count II. The government in its brief did not even attempt to refute the statement at page 10 of the petition for a Writ of Certiorari herein that absolutely no evidence was in the record connecting petitioner with Count II. In view of this situation, it is readily apparent that if no evidence was introduced relative to petitioner under said Count II and the other counts above, there was simply no evidence of

venue introduced at the trial to show that petitioner committed the alleged crimes in the Western District of Missouri.

The Sixth Amendment to the United States Constitution, in part, states that in all criminal prosecutions, the accused "shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *."

Petitioner's constitutional rights as aforesaid under the Sixth Amendment were apparently violated with respect to his convictions under counts II, V, VI and VII of the indictment. Venue is an essential which must be proved by the Government, as held by *Dean* v. *United States*, 246 F.2d 335 (C.C.A. 8th) and *United States* v. *Jones*, 174 F.2d 746.

IV.

**Petitioner's Rights under the Due Process Clause of the Fifth Amendment of the United States Constitution Were Violated Inasmuch As He Has Been Convicted in a District Court of the United States under Count II of the Indictment in This Matter, This Conviction Has Been Affirmed by the Eighth Circuit Court of Appeals and Certiorari Has Been Denied by This Court Although There Was Absolutely No Evidence Whatsoever Introduced and None Appears in the Record Connecting Petitioner with This Crime and the Government Does Not and Cannot Deny This Fact.**

As petitioner has pointed out to the Court of Appeals and as he pointed out to this court on page 10 of the Petition for a Writ of Certiorari filed herein, there is absolutely no evidence in the record connecting petitioner with the crime alleged in Count II of the indictment. It is elementary law that each count of an indictment alleges a

separate and distinct crime. The Government in its Brief in Opposition filed in this matter did not and could not deny the truth of the above statement that there was no evidence in the record connecting petitioner with Count II, although the jury found him guilty of the crime alleged therein, this conviction has been sustained by the Court of Appeals and certiorari has been denied by this court.

The Fifth Amendment to the Constitution of the United States of America states, in part, that no person shall be deprived of "life, liberty, or property, without due process of law * * *."

It is noted that due process of law in a criminal case includes the presumption of innocence and places the burden on the prosecution to prove the guilt of the accused beyond a reasonable doubt by the evidence which it offers and the inferences which may reasonably be drawn therefrom. *Government of the Virgin Islands* v. *Torres*, 161 F. Supp. 699; *Coffin* v. *United States*, 156 U.S. 432, 15 S. Ct. 394, 39 L. Ed. 481; *Agnew* v. *United States*, 165 U.S. 36, 17 S. Ct. 235, 41 L. Ed. 624; *United States* v. *Fleischman*, 339 U.S. 349, 70 S. Ct. 739, 94 L. Ed. 906.

It is respectfully submitted that when petitioner was convicted of a crime in a Federal court without any evidence being introduced to connect him with this crime, this was in violation of his constitutional rights under the Fifth Amendment.

For all the reasons set forth above, Petitioner respectfully asks that he be granted a rehearing on the order denying his Petition for a Writ of Certiorari.

Respectfully submitted,

WALTER A. RAYMOND and
KENNETH C. WEST,
*Counsel for Petitioner.*

## CERTIFICATE OF COUNSEL.

I hereby certify that the above Petition for Rehearing on Order Denying Petition for Writ of Certiorari in the above entitled cause is presented in good faith and not for delay and that same is restricted to the grounds specified in Rule 58 (2) of this Court.

Kenneth C. West,
*Counsel for Petitioner.*